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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AT&T CORP., *et al.*,

Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

AT&T CORP., *et al.*,

Petitioners,

v.

CALIFORNIA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

The Oppositions confirm the manifest importance of review of the Eighth Circuit's decision. Foremost, no party disputes that combinations of "unbundled network elements" obtained under § 251(c)(3) are the only mode of entry that can produce the immediate and broad-based local competition that is the object of the Telecommunications Act of 1996. Nor does any party dispute that the Eighth Circuit's invalidation of Rule 51.315(b) authorizes discrimination that cripples this form of entry. Indeed, the incumbent LECs do not deny that, unless this decision is reversed, they intend to foreclose competition by refusing to fill orders for existing combinations of network elements and by, instead, ripping the elements apart solely to raise their rivals' costs and to impose service outages on them. The Eighth Circuit's separate jurisdictional holdings compound these anticompetitive effects by depriving the FCC of its rulemaking and enforcement authority to help assure not only that network elements and other essential facilities are competitively priced, but also to implement other critically important requirements of the new local competition provisions.

Indeed, even the incumbent LECs do not claim that competition through unbundled network elements will remain viable after the Eighth Circuit's decision. Instead, they suggest that new entrants should compete either by building their own telephone networks or by limiting themselves simply to reselling the LECs' retail services. Bell Cos. Opp. 26-27. But Congress provided for unbundled element competition because neither of those "alternatives" would produce the rapid and widespread competition the Act seeks to foster. Requiring that carriers build their own facilities would limit competition to the small and specific geographic pockets where that is economically feasible, and resale requires new entrants to offer consumers the same retail "exchange services" that the LECs offer and cannot be used to compete at all with the LECs' $25 billion of "exchange access" services.

Similarly, it is incredible that the incumbent monopolists would assert that matters are now "working as Congress planned" and that the historically closed local telephone markets are effectively being "open[ed] . . . to competition" (Mid-Size LECs Opp. 24). The incumbent monopolists continue to control more than 98% of their markets precisely because of the Eighth Circuit's holdings. Correlatively, the incumbent local telephone industry has expended such enormous resources in litigating this case, and in now opposing certiorari, precisely because of the importance of the FCC rules that the Eighth Circuit vacated to the 1996 Act's objective of rapidly replacing the LECs' monopolies with competitive markets.

1. While the Eighth Circuit's invalidation of Rule 51.315(b) is the most important aspect of this case, it is logical to begin with that court's jurisdictional holdings. Once the Oppositions' misstatements are brushed aside, those briefs confirm that these holdings (1) are contrary to the decisions of this Court and those of other courts of appeals, and (2) have immense competitive and practical importance.

Contrary to respondents' contentions, the Eighth Circuit did not issue a series of "discrete" and "narrow" jurisdictional rulings against the FCC on multiple, separate issues (Bell Cos. Opp. 10, 12) based on an "independent analysis of the text of each statutory provision" (USTA Opp. 18). Each jurisdictional ruling was premised on the Eighth Circuit's conclusions that the Act does not unambiguously give the FCC rulemaking and enforcement authority over all the Act's requirements, and that Section 2(b) required it to construe them to deny the FCC authority over the local competition requirements because they were deemed to be "fundamentally intrastate." Pet. App. 23a; see 30a; 33-34a; 36a. Both holdings are erroneous.

First, numerous provisions of the Act expressly give the FCC rulemaking and enforcement authority over all the Act's requirements (*e.g.*, §§ 151, 201(b), 208, 251(d)), and this Court

has held that the FCC has authority to enforce and adopt rules that reasonably implement those requirements as long as those rules are not contrary to any of its provisions. *See FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178, 180-81 (1968); *CCIA v. FCC*, 693 F.2d 198, 212-13 (D.C. Cir. 1982), compare *Louisiana Pub. Servs. Comm'n* v. *FCC*, 476 U.S. 355, 370-374 (1986). Because it is undisputed that the newly-enacted requirements of Sections 251 and 252 unambiguously apply to intrastate as well as interstate uses of LEC facilities, the foregoing provisions and decisions establish the FCC's rulemaking and enforcement authority over these new requirements -- and require no "construction." Indeed, the whole point of codifying the local competition provisions of the 1996 Act in the Communications Act was to subject them to the FCC rulemaking and enforcement provisions of that chapter.

Thus, respondents can only rely upon the same interpretive contortions as did the Eighth Circuit to construe away the FCC's express statutory grants of jurisdiction. For example, although Section 201(b) grants the FCC comprehensive rulemaking authority to implement "the provisions of this *Act*", see 47 U.S.C. § 201(b) (emphasis added), respondents contend that it must be read to permit the FCC only to implement "section 201." Bell Cos. Opp. 18; GTE Opp. 19-20; see also Pet. App. 12a, 85a. Similarly, Section 251(d)(1) directs the FCC to "establish regulations to implement the requirements of this section," which includes the dialing parity requirements and the requirements that "rates" be "just, reasonable, and nondiscriminatory" (see 47 U.S.C. §§ 251(b)(3), 251(c)(2)(D), 251(c)(3)). Yet respondents, like the Eighth Circuit, impermissibly seek to rewrite Section 251(d)(1) so that it applies only to certain specific subsections of Section 251. Bell Cos. Opp. 17; Pet. App. 11a-12a & n.10, 85a. These readings of those provisions are erroneous and contrary to the decisions of this Court.

Second, the Eighth Circuit further reached its jurisdictional holdings despite the long line of other courts of appeals' decisions that have held that Section 2(b) does not bar FCC jurisdiction over requirements that inseverably apply to intrastate and interstate services. See Pet. 13-16 (citing cases). Respondents do not dispute that Sections 251 and 252 require LECs to provide competitors -- at a single set of rates, terms, and conditions -- with facilities that will then be used for both intrastate and interstate services. Instead, they ask the Court to ignore this conflict in the courts of appeals by claiming that the FCC did not rely on this ground in its Order. Bell Cos. Opp. 15; GTE Opp. 12, 20; State Comm'ns Opp. 12 n.20; California Opp. 6. But the FCC relied on this precise ground. See Pet. App. 194a-195a (rejecting view -- which "[n]o commenters support" -- that "interstate and intrastate aspects of interconnection" could be separated between FCC and State commissions and that FCC jurisdiction is therefore limited to "interstate aspects").

Every jurisdictional holding below thus depended on the court of appeals' overarching misconstruction of sections 201(b), 251(d)(1), and 2(b). With respect to pricing, respondents also claim that the Act "express[ly]" assigns exclusive jurisdiction over pricing to State commissions. GTE Opp. 19; see also Bell Cos. Opp. 12-13. But that "express" assignment is nowhere to be found. The requirement of Sections 252(d) and 252(c)(1) on which respondents rely -- that State commissions shall "establish . . . rates" -- is beside the point. That the State commissions will determine the rates has never been in dispute; under the Act, State commissions determine not only rates, but *all* the terms and "conditions" of arbitrated interconnection agreements. See 47 U.S.C. § 252(b)(4)(C). They do so, however, pursuant to the FCC rules adopted under Section 251 (see 47 U.S.C. § 252(c)(1)) -- as even respondents concede the State commissions must do

with respect to at least some of the terms and conditions they establish. See Bell Cos. Opp. 13.

Finally, this jurisdictional dispute has immense importance and is not merely a "turf battle." GTE Opp. 24. Most States have set only "interim" prices, and their proceedings to set "permanent" prices have not yet been completed. It is true that all States have thus far agreed with the FCC in rejecting the LECs' most extreme claims that they should be permitted to pass on to their competitors their bloated "historic costs," and the majority of States have largely followed the FCC's pricing rules to date. But a substantial minority have not, as respondents ultimately concede by noting that many State commissions would have to "re-work their pricing decisions" if the FCC rules again became effective, GTE Opp. 25; see also State Commn's Opp. 6 n.7, and no Opposition disputes the significance of the Eighth Circuit's jurisdictional holdings on non-pricing matters.

Further, all or virtually all State pricing decisions made thus far are being relitigated. LECs are making their extreme claims in the numerous suits they have brought in federal district courts against State commissions under Section 252(e)(6), and new entrants are challenging other State commission decisions that they found unfavorable. The relitigation of these issues will impose an enormous burden both on those new entrants and on the federal courts, which, under the Eighth Circuit's decision, will have to assess the States' determinations independently, *without* the guidance of FCC rules that define the Act's pricing requirements and that would be entitled to *Chevron* deference.

As this underscores, respondents' strained efforts to portray this case as vindicating values of "federalism" (GTE Opp. 22) are particularly misplaced. State laws and rules on the subjects addressed by Section 251 have been preempted by federal law and federal courts will enforce those federal requirements against the States. The only issue presented here

is whether Congress meant for the federal courts making those decisions under federal statutory law to have the benefit of federal rules on those same subjects.

2. Whatever decision the Court reaches with respect to jurisdiction, the Oppositions confirm that the Eighth Circuit's invalidation of Rule 51.315(b) should be reviewed. As the Solicitor General states (U.S. Pet. 28), that holding is at least as significant as the jurisdictional holding. Indeed, no party disputes that combinations of unbundled network elements are the only entry vehicle that will enable immediate and broad-based competition to the existing monopolies, and that this competition cannot occur if the LECs can impose the service outages and "disassembly" and "reassembly" costs on their competitors' customers that they have promised to impose under the Eighth Circuit's decision. Thus, respondents' attempt to portray this as a "second level" "tag-along" issue (Bell Cos. Opp. 2, 21) is a transparent effort to divert the Court from a critically important aspect of the case.

Further, the Oppositions confirm that this holding conflicts with the decisions of this Court and other courts. In particular, Rule 51.315(b) was adopted to implement the first sentence of Section 251(c)(3), which requires incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(3). This requirement of "nondiscriminatory" access was imposed because new entrants will not be able to use network elements to compete with LECs if they cannot obtain the same quality of access, at the same economic cost, as the incumbent LEC. Here, the Eighth Circuit did not dispute the FCC's finding that Rule 51.315(b) was necessary to prevent blatant discrimination against new entrants. Rather, as the Petition demonstrates the Eighth Circuit invalidated the rule on the basis of an unexplained assertion that the statutory term "unbundled" has a "plain meaning" that is contrary to the

uniform dictionary, regulatory and judicial definitions of the term. Pet. 23-26. Yet the LECs cite no any authority that supports the Eighth Circuit's unprecedented construction, much less that suggests that it is the only possible interpretation.

The LECs are thus reduced to attempting to defend the Eighth Circuit's holding, and to oppose certiorari, on a series of other grounds that are all insubstantial. *First*, the Bell Companies now claim (as they did not below) that the FCC itself had adopted the Eighth Circuit's interpretation of "unbundled" by requiring incumbent LECs to provide new entrants "with the functionality of a particular element, separate from the functionality of other elements, and [to] charge a separate fee for each element." Bell Cos. Opp. 25. This claim is frivolous. There is nothing in the requirement that LECs provide new entrants with individual functionalities at distinct charges that requires that network elements that exist in combination be physically separated. Further, if the FCC had understood its requirement in that eccentric way, it obviously could not have adopted Rule 51.315(b).

Second, the LEC respondents contend that the second sentence of § 251(c)(3) -- which provides that the LEC must provide network elements "in a manner that allows requesting carriers to combine" them -- authorizes them to physically separate network elements that are already combined in order to impose on new entrants the costs of re-combining those elements. Pet. App. 25a. Here, the LECs are again baselessly seeking to convert a provision that imposes obligations on the incumbents to *facilitate* access to their networks by new entrants into an entitlement to impede such access. Further, the second sentence of § 251(c)(3) imposes an obligation on incumbent LECs that is in *addition* to the fundamental nondiscrimination requirement of § 251(c)(3)'s first sentence. This second sentence applies when new entrants seek to combine LEC network elements in different ways than they are combined within the LECs' existing network, or to combine

such elements with their own facilities. It does not negate the nondiscrimination requirement for elements that are already combined.

Third, the LECs contend that the Eighth Circuit's novel construction of "unbundled" was necessary because, if incumbent LECs were not able to impose additional, artificial costs on competitors and their customers by disassembling combinations of network elements, then new entrants could obtain "the equivalent of a complete service for resale" while "circumventing the resale pricing rules" by purchasing a combination of all network elements used to provide a service. See Bell Cos. Opp. 22-23; GTE Opp. 26-28. As a threshold matter, even if it were otherwise meritorious, this argument could not possibly justify the Eighth Circuit's decision. That decision authorizes LECs to separate network elements whenever a new entrant orders any "two or more" combined elements, not merely when it orders all seven elements necessary to provide a service. Pet. App. 71a.

But in all events, the argument is meritless. It rests on the perverse notion that courts and LECs must manufacture artificial costs and impediments, beyond those that are already inherent in the business, for new entrants seeking to compete through network elements. The sole justification offered by the Eighth Circuit was that such artificial costs would ensure that resale also remained a comparatively attractive option. Pet. App. 56a-57a, 71a. That rationale was wrong on both the law and the facts. Congress created multiple entry vehicles in order to create different opportunities for competition for entrants with different business plans, and did not instruct courts to make any one of them artificially more difficult simply in order to equalize their appeal. In all events, the FCC found, on the basis of an abundant record, that unbundled network elements naturally present a new entrant with both greater competitive opportunities and greater competitive risks, and that there was no prospect that the availability of combined network elements

would nullify the provisions requiring that services also be made available for resale or render those provisions unlikely to be used. Pet App. 243a-246a. Respondents have never even attempted to show, and cannot show, that this factual finding did not rest on substantial evidence.

Finally, the LEC respondents suggest that the Court should deny certiorari because there may be other means to prevent them from engaging in this anticompetitive conduct even if the Eighth Circuit's decision stands. For example, they claim (Bell Cos. Opp. 27-28) that the issue is currently before the Eighth Circuit in an appeal of the FCC's *Third Reconsideration Order* in the same FCC proceeding. That is simply false. In that appeal, the LECs are challenging the FCC's determination that "shared transport" -- the transmission paths within LEC networks between LEC switches -- is a separate *individual* network element. By contrast, the issue here is whether the LEC may rip that facility apart from *other* network elements with which it is already combined before providing it to new entrants.

The LECs further note (*id.* at 27) that some State laws may independently prohibit LECs from engaging in this form of discrimination. But the issue here is what federal law requires, and it has never been an answer to the evisceration of a federal right that some States may choose to guarantee that right under state statutory or constitutional law. Moreover, the LECs that cite the possibility of a state-law solution to their conduct are not merely "vigorously disagree[ing]" with such claims (*id.*); they are arguing in numerous States that the Eighth Circuit's decision *itself* preempts and forecloses such action even under State law.[1]

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[1] *See, e.g.*, Ameritech's Legal Memorandum Regarding Effect Of Rehearing Order Of The U.S. Court Of Appeals For The Eighth Circuit (Illinois Commerce Commission Nov. 3, 1997); Reply Comments of Bell Atlantic-New

(continued...)

3. Respondents also defend the Eighth Circuit's holdings on both jurisdiction and Rule 51.315(b) by vaguely suggesting that those holdings were somehow necessary to protect the existing mechanisms that support "universal service." Bell Cos. Opp. 3-4, 13-14; GTE Opp. 2, 7, 22; Mid-Size LECs Opp. 22-23. This is nonsense. Section 254 of the Act invalidated the prior systems of funding universal service through implicit subsidies in which excessive rates are charged certain classes of customers, allegedly to support lower rates to others. Instead, Section 254 adopts a new system in which universal service will be financed not from rates LECs charge competitors, but from a separate fund to which all providers of service, including those that use unbundled network elements, will contribute on a competitively neutral basis. While Section 254 has not yet been fully implemented, it will be implemented soon, and the Act requires that the local competition provisions of §§ 251 and 252 take effect before § 254. Compare § 251(d)(1) with § 254(a). Further, the FCC has found that there is no prospect of such a massive growth of local competition during that short interim period as would place any pressure on universal service. See Order, ¶ 20, *Access Charge Reform*, 12 FCC Rcd. 10175 (1997). In all events, if the Eighth Circuit's decision stands, respondents' unfounded claims about how the Act should be interpreted will continue to apply, and to impede the development of competition, even after § 254 is fully implemented.

CONCLUSION

The petition for writ of certiorari should be granted.

(...continued)
York in Support of its Proposed Tariff Amendments Relating to the Provision of Unbundled Network Elements on a Combined Basis (New York PSC Dec. 16, 1997).

Respectfully submitted,

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